

BEFORE THE
Federal Communications Commission
 WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)

Promotion of Competitive Networks in Local Telecom-)
 munications Markets)

WT Docket No. 99-217

Wireless Communications Association International, Inc.)
 Petition for Rulemaking to Amend Section 1.4000 of the)
 Commission's Rules to Preempt Restrictions on Sub-)
 scriber Premises Reception or Transmission Antennas)
 Designed to Provide Fixed Wireless Services)Cellular Telecommunications Industry Association)
 Petition for Rulemaking and Amendment of the Com-)
 mission's Rules to Preempt State and Local Imposition of)
 Discriminatory and/or Excessive Taxes and Assessments)Implementation of the Local Competition Provisions of)
 the Telecommunications Act of 1996)

CC Docket No. 96-98

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Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments)	
)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996)	CC Docket No. 96-98
)	

To: The Commission

REPLY COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits its reply comments in the above-captioned *Notice of Proposed Rulemaking* in WT Docket No. 99-217 and *Third Further Notice of Proposed Rulemaking* in CC Docket No. 96-98.¹

¹ *Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local Imposition of*
(continued...)

I. INTRODUCTION/SUMMARY

The *Notice* solicits comment on a number of proposed regulatory actions intended to help competitive telecommunications service providers secure reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple dwelling units ("MDUs").² U S WEST supports the fundamental goal of enabling MDU end users to have a choice of telecommunications providers. To that end, U S WEST submits that exclusive "access" arrangements which effectively prevent a provider from serving an MDU end user seeking its service should be prohibited. Any prohibition against exclusive access arrangements, however, should not prohibit carriers from entering into exclusive *marketing* arrangements with MDU owners. U S WEST agrees with SBC Communications, Inc. that such arrangements serve many valid business purposes which can benefit the property owner and their tenants alike.³

In U S WEST's experience, CLEC access to in-building wire, conduit and other building space in which to place facilities, is primarily an issue between the CLEC and the property

¹ (...continued)
Discriminatory and/or Excessive Taxes and Assessments; and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 99-141 (rel. July 7, 1999) ("*Notice*").

² The term MDU refers to offices, apartments, condominiums, college dormitories and other multiple tenant environments.

³ See SBC Comments at 7. Under exclusive marketing arrangements, end users would always retain the choice of service providers, while individual carriers would be entitled to market on the MDU premises, on an exclusive basis. An exclusive marketing arrangement would provide carriers the incentive to make investments at MDUs they might not otherwise be willing to undertake such as placing a kiosk at the premises to allow tenants to try out new technologies, features and capabilities. Building owners, in turn, would be able to differentiate their properties by having readily available high speed data services and video services, as well as other capabilities specifically designed to serve the shared interests of their tenants such as voice mail on a single platform. Ultimately, this would provide tenants greater choice and promote competition.

owner. In other words, MDU access is fundamentally dependant upon a building owner's — and not the ILEC's — willingness to negotiate reasonable access terms. Indeed, WinStar Communications, Inc. states that “many consumers in [MDUs] are denied competitive choice because [MDU] owners and managers, whether by action or inaction, prohibit competitive local exchange carrier (“CLEC”) access to their tenants or impose such unreasonable conditions or demand such high rates for access that providing competitive telecommunications service to their buildings is rendered uneconomic.”⁴

Moreover, U S WEST believes that the issues associated with providing access to MDUs vary from building to building, depending on a number of factors including the technology used by the CLEC, the design of its network and, in existing buildings, upon the engineering arrangements already deployed by the LEC. The comments filed in this proceeding demonstrate the wide variety of circumstances under which telecommunications services are furnished in MDUs and the array of different problems that can arise for a local exchange carrier seeking MDU access. Indeed, the Association for Local Telecommunications Services presented a 12-page list of MDU access problems from around the country, and each problem listed presented a slightly different circumstance.⁵

⁴ WinStar Comments at 3, 13-51.

⁵ ALTS Comments at 6-18. For example, ALTS cites a situation in New York City where a building manager will not permit a CLEC into the building without a revenue sharing agreement. *Id.* at 17. In another example, a building owner refuses to negotiate access with a CLEC and has threatened the CLEC with legal action regarding the CLEC's continuing efforts to negotiate with the building owner. *Id.* at 16. In yet another example, a building owner in Houston has not denied access, but rather delayed the matter by requesting engineering studies, architectural plans and fees. *Id.* at 7.

U S WEST also has had to deal with the demands of building owners in negotiating access to MDUs. However, it would be inadvisable, in U S WEST's view, for the Commission to attempt to craft specific and detailed rules governing the behavior of telecommunications services providers, given the large role played by building owners and the wide variety of circumstances under which telecommunications services are furnished in MDUs. The record in this proceeding demonstrates that such rules would be ineffective in addressing the majority of the concerns raised by the CLECs. U S WEST submits, therefore, the Commission should continue to rely on private negotiation as the primary means for securing access to MDUs.⁶ Should the Commission nevertheless attempt to craft new MDU access rules, it should be guided by the following principles.

- In order to give end-users in MDUs a choice of carriers, telecommunications carriers should not be permitted to enter into exclusive access arrangements with building owners.

⁶ In this regard, the Commission has generally relied upon on private negotiation with case-by-case resolution of problems, instead of detailed, generally applicable rules to regulate MDU access. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16084-85 ¶ 1185 (1996) ("Local Competition First Report and Order"). Moreover, to the extent that access problems do arise, the Commission also has in place expedited complaint procedures to "ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable." 47 C.F.R. § 1.1401. Comments show these procedures to have been reasonably successful, given the complexity of the issues related to MDU access. *See Winstar Comments* at 3 ("Winstar is proud to be the single most successful entity in obtaining building access rights, having obtained access to approximately 5,500 buildings to date, 700 in the last quarter."); *Real Estate Access Alliance Comments* at iii-iv ("The Alliance commissioned a survey of the world of available telecommunications competition as it exists for building owners today. . . . The survey is a statistically valid, random sampling of building owners and managers, which shows that: two-thirds of all requests for access by telecommunications providers have resulted either in an agreement or pending negotiations; specialized telecommunications access agreements do not take substantially longer to negotiate than ordinary tenant leases. . . .").

- The rights of property owners, including telecommunications carriers, must be respected and private property must not be taken without clear Congressional authorization and only upon payment of just compensation.
- Incumbent LECs should have reciprocal rights regarding access to poles, conduits, ducts and rights-of-way.
- Wireless carriers should have the same ability to access MDUs as other carriers.
- The Commission should give deference to and not upset existing federal, state, and local law and precedent governing use of public rights-of-way, private easements, and the exercise of the power of eminent domain.
- A carrier cannot be required to provide access to its poles, conduits and rights-of-way in any way that exceeds the rights that carrier holds by virtue of its easement.

These principles will help ensure that any new MDU regulations adopted by the Commission will strike an appropriate balance between strengthening carrier access to MDUs and reliance on private negotiation.

II. CONGRESS HAS STRICTLY LIMITED THE COMMISSION'S AUTHORITY TO TAKE PRIVATE PROPERTY TO PROVIDE ACCESS TO POLES, CONDUITS, DUCTS AND RIGHTS-OF-WAY

The Commission has no authority to take private property without clear Congressional authorization and only upon payment of just compensation. U S WEST, as both a telecommunications carrier and a property owner, is concerned that the Commission may be considering the adoption of an expansive interpretation of Section 224 that would require LECs to provide access to any rooftops and riser conduit they own or control. Any such Commission interpretation would result in an unauthorized taking of LEC property. Such taking would also require

payment of just compensation or be violative of the Fifth Amendment. The Commission has no authority to interpret Section 224 in such an expansive fashion.⁷

Section 224 is designed to ensure that cable and telecommunications carriers are afforded access at reasonable rates to poles, conduits, ducts, and rights-of-way. It is the only section of the Act that gives the Commission authority to take ILEC property in order to allow competing providers access to poles, conduits and rights-of-way. However, Section 224 does not mandate that a utility make space available on the roof of its corporate offices for the installation of a transmission tower, or confer a general right of access to utility property. The Commission reached this conclusion in the *Local Competition* proceeding, in which it found that a utility's obligations under Section 224 were essentially limited to permitting cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by the utility.⁸ As the Commission acknowledged, Section 224 was not intended to "grant access to every piece of equipment or real property owned or controlled by the utility."⁹ This statutory interpretation is appropriate and should not be expanded; it avoids undue impacts upon building owners and managers, as well as LECs.¹⁰

As mentioned above, expanding the Commission's current reading of Section 224 would directly implicate Fifth Amendment considerations. The Fifth Amendment's protections

⁷ Numerous commenters support this position. See Comments of United States Telephone Association at 5-12; Ameritech at 2-4; Bell Atlantic at 7-9; BellSouth at 9-15; Electric Utility Coalition at 2-3; and GTE Service Corporation at 21-27.

⁸ *Local Competition First Report and Order*, 11 FCC Rcd. at 16084-85 ¶ 1185.

⁹ *Id.*

¹⁰ *Id.*

regarding private property extend to all private property — including that owned by LECs.¹¹ The Supreme Court has ruled that a statute requiring building owners to permit cable television service providers to install facilities on their premises was a *per se* taking which required just compensation.¹² Relying on this precedent, the Eleventh Circuit recently determined that the Section 224(f)'s mandatory access to utilize poles, conduits and rights-of-way also constitutes a taking of property under the Fifth Amendment.¹³ Further, the Court of Appeals for the District of Columbia Circuit has held that the Commission may not effect a “taking” of private property without express statutory authority.¹⁴ To that end, the Commission may require a utility to provide access to its poles, conduits, ducts and rights-of-way only with just compensation and only within the narrow confines of its express statutory authority.¹⁵ Moreover, a *de novo* standard of review applies to an agency's determination of a statute's constitutionality.¹⁶ The Commission's power under Section 224 must therefore be exercised with extreme caution and

¹¹ U.S. Const., Amendment V.

¹² *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 436-37 (1982).

¹³ *Gulf Power Co. v. FCC*, No. 98-2403 (11th Cir. September 9, 1999).

¹⁴ *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

¹⁵ The Commission seeks comment on whether its *OTARD* decision compels a different conclusion. *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, 13 FCC Rcd. 23874 (1998). U S WEST believes that the *OTARD* decision is inapposite in light of *Gulf Power*. *Gulf Power* specifically holds that the mandatory access provision of Section 224 constitutes a *per se* taking for purposes of the Fifth Amendment.

¹⁶ *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342, 1346 (11th Cir. 1999).

only to the extent required to achieve the specific Congressional purposes underlying Section 224.¹⁷

In addition, the Commission cannot rely on Section 224 as a basis for requiring an ILEC to provide access beyond the rights the ILEC secured from the property owner in the first instance. A contrary interpretation would improperly impinge upon the owner's personal property. As the Commission recognizes, "[t]he scope of a utility's ownership or control of an easement or right-of-way is a matter of state law."¹⁸ More specifically, the easement grant is decisive of the limits of a utility's "ownership" or "control,"¹⁹ and if an easement owner exceeds his/her rights either in the manner or in the extent of its use, the owner becomes a trespasser to the extent of the unauthorized use. Consequently, a utility can be required to provide access to a CLEC only within the limits of its easement grant, and it cannot be required to provide to a CLEC more rights than it secured from the building owner without impinging upon the owner's personal property.²⁰

¹⁷ Notice, Separate Statement of Commissioner Michael K. Powell, Concurring; Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part.

¹⁸ Notice at ¶ 47 n.104, citing *Local Competition First Report and Order*, 11 FCC Rcd. at 16082 ¶ 1179.

¹⁹ See generally 25 Am. Jur. 2d *Easements and Licenses* § 74; 74 Am. Jur. 2d *Telecommunications* § 15.

²⁰ The Commission suggests that this problem might be avoided if the LEC uses its power of eminent domain to expand its existing right-of-way over private property. Notice at ¶ 46. Although the Commission claims authority to require LECs to exercise their power of eminent domain to the benefit of third parties (*Local Competition First Report and Order*, 11 FCC Rcd. at 16083 ¶ 1181), U S WEST submits that this would be a wholly inappropriate action by the Commission. The power of eminent domain is granted under state law and is subject to whatever limitations the state wishes to place on it. The Commission should not attempt to preempt or otherwise distort state eminent domain

(continued...)

As discussed, Section 224 is not a broad grant of access to every piece of equipment and real property owned by a utility. Further, the general authority afforded the Commission by Section 4(i) clearly lacks the statutory particularity required under *Bell Atlantic*. Accordingly, the Commission cannot require ILECs to provide CLECs access to their real property or facilities except in the narrow circumstances established by Section 224, *i.e.*, the property in question is used as part of the LEC's network for distributing telecommunications services to its customers. Any other interpretation would violate law and raise Constitutional concerns.

III. ILECs SHOULD BE GRANTED RECIPROCAL ACCESS RIGHTS

A. Reciprocal Access Rights are Justified in The Developing Competitive Market

U S WEST believes that ILECs should have the same rights to request access to an MDU wired by a CLEC as CLECs have with regard to ILEC-wired buildings. Stated another way, any carrier that wires a building should be subject to the same access obligations regardless of whether that carrier is generally regulated as a CLEC or ILEC.²¹ Bell Atlantic, GTE and USTA also support the concept of reciprocal access rights and obligations.²²

Establishing reciprocal access rights would be appropriate given the state of the local telecommunications market today. In the case of new construction, for example, a CLEC now often contracts with the developer to install its own distribution facilities in MDUs. In such

²⁰ (...continued)

law. Further, to the extent the FCC seeks to expand a carrier's rights, duties and obligations under state eminent domain law its actions would be tantamount to an amendment to state law — which it clearly cannot do.

²¹ In addition, reciprocal access rights should apply even to carriers who originally wired a building to provide cable rather than telecommunications services.

²² See Comments of Bell Atlantic at 3-5, GTE at 3, USTA at 17.

circumstances, the ILEC would be in the position of having to negotiate with the CLEC in order to secure access to serve end users in that MDU. Giving ILECs reciprocal rights would promote the goal of giving MDU tenants a choice in telecommunications service providers.

B. A Proper Reading of the Telecommunications Act of 1996 Supports Reciprocal Access Rights

U S WEST recognizes that “[f]or purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, [hence] an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities.”²³ However, pursuant to Section 251(b)(4) each “local exchange carrier” has the duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications service. . . .”²⁴ In U S WEST’s view, this language mandates that once a CLEC enters into an interconnection agreement, both carriers must provide reciprocal access to their respective poles, ducts, conduits, and rights-of-way.²⁵

The Commission, however, has held that Section 251(b)(4) does not provide ILECs a means for gaining access to the facilities or property of a CLEC.²⁶ At least one federal court, however, has reached a different conclusion regarding whether Section 251(b)(4) entitles ILECs to obtain access to the facilities or property of CLECs. In *U S WEST v. AT&T*, the court reversed

²³ *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments, Report and Order* 11 Comm. Reg. (P&F) 79, 84 (1998); 47 U.S.C. § 224(a)(5).

²⁴ 47 U.S.C. § 251(b)(4).

²⁵ *See U S WEST Communications Inc. v. AT&T Communications of the Pacific Northwest, Inc. et al.*, 31 F. Supp. 2d 839 (D. Or. 1998).

²⁶ *Local Competition First Report and Order*, 11 FCC Rcd. at 16104 ¶ 1231.

a PUC finding that an interconnection agreement provision granting U S WEST reciprocal access to AT&T and MCI's poles, ducts, conduits and rights-of-way was inconsistent with the Communications Act.²⁷ The PUC agreed with the Commission's reasoning that Section 224 necessarily prohibited the application of Section 251(c)(4) to ILECs.

The court rejected this argument, reasoning that the canons of statutory construction require that a court or agency give effect, if possible, to every clause and word of a statute rather than render an entire section a nullity.²⁸ By denying ILECs the ability to access CLEC poles, ducts, conduits and rights-of-way pursuant to Section 251(b)(4), the Court concluded that the PUC had rendered Section 251(b)(4) merely duplicative of Section 224 and therefore meaningless. In the court's view, on the other hand, reading Section 251(b)(4) as providing *all* LECs access to poles, conduits, ducts and rights-of-way would give full effect to Section 251(b)(4) as well as Section 224.²⁹

Thus, if the Commission elects to adopt new MDU access rules, U S WEST urges it to also reconsider its conclusion that Section 251(b)(4) does not provide ILECs reciprocal rights to access poles, conduits, ducts and rights-of-way of other telecommunications carriers.

CONCLUSION

U S WEST believes that it would be inadvisable for the Commission to attempt to craft - specific and detailed rules governing the behavior of building owners or telecommunications services providers, given the wide variety of circumstances under which telecommunications

²⁷ *U S WEST Communications Inc. v. AT&T Communications of the Pacific Northwest, Inc. et al.*, 31 F. Supp. 2d 839, 849-51 (D. Or. 1998).

²⁸ 31 F. Supp. 2d at 850, *see also Bennett v. Spear*, 520 U.S. 154 (1997).

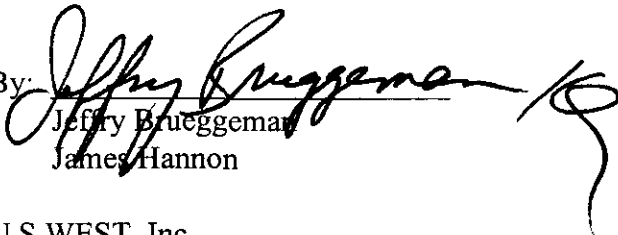
²⁹ *Id.*

U S WEST, Inc.
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services are furnished in MDUs. U S WEST submits that the Commission should instead continue to rely on private negotiation as the primary means for securing access to MDUs. Any new MDU access rules adopted by the Commission should be guided by the general principles enunciated above.

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